

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON TOLSON,

Defendant-Appellant.

UNPUBLISHED

May 22, 2007

No. 267404

Wayne Circuit Court

LC No. 05-003426-01

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to two years' probation for his felonious assault and carrying a concealed weapon convictions, and two years' imprisonment for the felony-firearm conviction. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he was denied the effective assistance of counsel because defense counsel failed to call certain witnesses. We disagree. Because the trial court did not hold an evidentiary hearing, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). However, if a claim of ineffective assistance of counsel involves a question of law, this Court's review is de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness; and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005), vacated in part on other grounds 477 Mich 856 (2006). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *Walker, supra* at 545.

This is defendant's second trial on these charges; the first trial resulted in a hung jury. Defense counsel presented two witnesses during defendant's first trial, Dwayne Reynolds and Reginald Reynolds. These witnesses were not presented during defendant's second trial. Defendant argues that because these witnesses were not presented at his second trial, he was denied the effective assistance of counsel. We disagree.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and therefore, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

Although defendant argues that defense counsel's failure to recall Reginald and Dwayne during his second trial denied him the effective assistance of counsel, defendant fails to show that defense counsel's failure to present these witnesses denied him a substantial defense. The substance of Reginald's and Dwayne's testimony during the first trial was covered by the testimony of Angela Smith during this trial. Reginald, Dwayne and Angela maintained that defendant did not have any weapons on the night in question nor did he threaten anyone. They all maintained that, although defendant was arguing with Yolanda Stone, defendant retreated into his mother's house at the request of the police and that he did so without incident. Thus, the decision not to call Reginald and Dwayne did not deprive defendant of a substantial defense.

Additionally, because Dwayne testified during the first trial that the police only came to the neighborhood one time that night and they did not return for a follow-up incident, it is likely that defense counsel failed to call Dwayne at the second trial because of the possibility of impeachment. During defendant's second trial, the prosecution presented the testimony of two police officers that verified that they were dispatched to Stone's house twice that night, around 10:30 p.m. and 12:20 a.m. The first dispatch, at 10:30 p.m., was related to the neighborhood disturbance that took place at that time, while the second dispatch, at 12:20 a.m., was related to the weapons claim. According to Officer Joseph Dabliz, he knocked on Jonnie Smith's door around 12:20 a.m., but no one answered. Dwayne claimed that he was outside on his front porch, which is next to Stone's property, until 2:00 a.m., and did not see the police return nor knock on Smith's door. However, Officer Dabliz maintained otherwise. Because it appears that Officer Dabliz's testimony during the second trial and portions of Dwayne's testimony during the first trial conflicted, defense counsel most likely decided not to present this witness as part of trial strategy. For all the reasons stated, defendant's claim lacks merit.

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray